No. 91.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

CHARLES R. FISCHER, Commissioner of Insurance of the State of Iowa, as Receiver for the American Life Insurance Company, *Petitioner*,

vs.

AMERICAN UNITED LIFE INSURANCE COMPANY, JOHN G. EMERY, Commissioner of Insurance of the State of Michigan, as Permanent Liquidating Receiver of the American Life Insurance Company of Detroit, Michigan, and DAN E. LYDICK, Receiver of the American Life Insurance Company of Detroit, Michigan, *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF FOR CHARLES R. FISCHER, COMMISSIONER OF INSURANCE OF THE STATE OF IOWA, AS RECEIVER FOR THE AMERICAN LIFE INSURANCE COMPANY.

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I.

REPLY OF PETITIONER TO RESPONDENTS' STATEMENT OF CASE.

Petitioner's brief states the facts pertinent to the issues involved in this case. These facts are in the main stipulated by the parties. Respondents' additional statements in their separate briefs contain many legal conclusions and an unwar-

ranted criticism of petitioner's statement in regard to quoted excerpts from the reinsurance contract Exhibit "A", which require further comment.

In the consideration of this case we know this Court will read and consider the reinsurance contracts in their entirety as well as other contracts upon which the issues of this case are founded. While it is difficult to determine wherein the quoted excerpts of the contracts are misleading so as to merit criticism, it is not petitioner's intention to mislead the Court or limit consideration of the contracts to the quotations.

Respondents, Michigan Receiver and American United, adopt *in toto* the arguments of each other. The argument upon the facts seems to have been left primarily with the respondent American United Life Insurance Company. The weakness of respondents' position is emphasized by the following from the American United brief, page 18:

> "The reasons which actuated the contracting parties in 1921 to state in the reinsurance agreements that there would be continued deposits with the Commissioner of Insurance 'as would have been required of said American Life Insurance Company of Des Moines, Iowa, under the laws of said State of Iowa' (R. 207, 211, 217) cannot now be made clear. For reasons unknown at this time and not disclosed by any legal requirement of Iowa, that part of the assets of the Michigan Company received from the Iowa Company continued to be maintained in Iowa as provided by the contract of reinsurance *'as would have been required'* if the Iowa Company had continued its independent existence of a domestic company in Iowa."

The answer to this pronouncement is obvious. The policy contract, the reinsurance contract and the assumption agreement by the Michigan Company speak for themselves. There is no obscurity of the intention or meaning of the provisions. The policy contract required, and each of the other writings

provided, that, so far as the deposit and its continued maintenance with the Insurance Commissioner of Iowa was concerned, the deposit remained in practical effect domestic in character. The authority for this requirement is given the Insurance Commission of Iowa under Code Section 9111, Code of Iowa 1939, wherein it is authorized to protect the interests of the policyholders in the consolidation and reinsurance of any company organized under the laws of the State of Iowa to do the business of life insurance. A further reason is that the deposit statutes and liquidation statutes of the State of Iowa were a part of the Iowa policy contract and the Michigan Company did not change or rewrite their provisions but continued their performance by treating them the same as policies of the Iowa Company. The liquidation statutes control the deposits of domestic and foreign companies since Chapter 398, Section 8643, Code of Iowa, 1939, provides: "Every life insurance company upon the level premium or natural premium plan created under the laws of this or any other state or country shall, before issuing policies in the state, comply with the provisions of this Chapter applicable to such companies." Chapter 398 includes Sections 8660 to 8663 inclusive, which provide for receivership and liquidation of deposits of domestic and foreign companies.

Respondents' contention that the securities deposited in Iowa should be turned over to the Michigan Receiver for distribution under the theory that "equality is equity" negatives and renders meaningless both the provision in the reinsurance contracts for the continuation of the deposit in Iowa and the action of the Michigan Company in so maintaining said deposit since 1921. The reason for the insistence of the Iowa Commission upon the retention of the deposit in Iowa after the Michigan Company acquired the business of the Iowa Company, is clear. The Iowa authorities foresaw that should the Michigan Company subsequently become insolvent, the

Iowa Company's policyholders might be left to accept whatever disposition was made by a foreign court, without benefit of the application pursuant to Iowa law of a specific deposit equal to the legal reserve on said policies, in reliance upon which deposit they had become policyholders of the Iowa Company, unless the deposit and administration of the deposit assets under the Iowa law were preserved for them. Retention of a specific deposit for the security of the policyholders originating in the Iowa Company and the administration of the same under the laws of Iowa in the event of insolvency of the Michigan Company, is the ultimate objective of each of the reinsurance agreements (R. 203).

The contingency of insolvency of the Michigan Company has now occurred. Respondents insist, first, that the deposit can be administered only by the Michigan Receiver, and second, that the deposit will be applied for the benefit of all policyholders equally, regardless of whether the policies originated in the Iowa Company or in the Michigan Company. Unless the deposit requirements of the reinsurance contracts (R. 203) are construed to compel the application of the deposits for the benefit of the policies originating in the Iowa Company, pursuant to Iowa statute and under the administration of petitioner, directed by the Iowa court, such deposit provisions of said reinsurance contracts and the continuance of the deposit in Iowa thereunder since 1921 has been meaningless. There was no reason for the Iowa Insurance Commission requiring the continuance of a deposit in Iowa equal to the net reserves on the Iowa Company's policies as a condition of the reinsurance of the Iowa Company's business by the Michigan Company, if, now upon insolvency, that deposit is to be turned over to respondent Michigan Receiver, to be by him applied equally for the benefit of all policies of the Michigan Company whether originating in the Iowa Company or not.

Respondents set out Section 8652 of the Code of Iowa, 1939, which requires a deposit of $100,000.00 in approved securities for the benefit of all policyholders before any foreign insurance company may transact business in the State of Iowa.

Respondent Michigan Receiver in his statement of the case concludes that the reason for the deposit in excess of $3,600,000.00 with the Insurance Commissioner of Iowa and the maintenance of this deposit, pursuant to the statutes of the State of Iowa, in an amount equal to the net reserves of the Iowa policyholders' contracts originating in the Iowa Company, is merely a matter of contract whereby the deposit was increased and the requirements of the statute enlarged for the purpose of increasing the deposit required of a foreign company from $100,000.00 to in excess of $3,600,000.00 for benefit of all policyholders. Respondents' case is now bottomed on this proposition. Respondents have changed from their previous contention that the contracts were *ultra vires.*

Petitioner contends such position is not tenable or a correct interpretation of the contracts, the clear intention of the contracting parties or of the Insurance Commission of the State of Iowa and the Insurance Commissioner of the State of Michigan who approved the contracts. Petitioner's position is that the deposit was made for the sole benefit of policyholders whose contracts originated in the Iowa Company and whether the deposit was voluntary, contractual or statutory, it was a trust fund and the Commissioner of Insurance of Iowa was trustee, and, when the Commissioner of Insurance was appointed statutory receiver, the character of the trust fund was not changed and the statutory receiver, upon direction of the Iowa Court, was required to administer the fund for the benefit of the persons for whom the trust fund was created.

While the relevancy and the materiality to the issues in this case is questioned by petitioner, respondents refer to and argue regarding a management contract made between the respondent Michigan Receiver and the respondent American United Life Insurance Company subsequent to the receiverships and as of date November 17, 1939, and a certificate of assumption issued by the American United Company to all policyholders of the Michigan company. Petitioner calls the Court's attention to this agreement and particularly Article 36 (R. 313-341). Article 36 (R. 338).

The Commissioner of Insurance of Iowa, as receiver for the Iowa deposit, is not a party to this agreement nor was any attempt made to make or recognize him as a necessary party in interest. While not a party, upon interrogation in this case in the trial court he expressed his opinion that it was an improvident agreement for any and all policyholders who might be subjected to it because it created a 75% lien bearing interest at 4% against the net reserve of the policyholders' contract. Petitioner's contention is that the Iowa policyholders could not and did not accept the terms of this management contract and that, under the law, the Insurance Commissioner of Iowa as receiver, having the standing of a statutory trustee, was the only one who could act after insolvency of the company in the approval or rejection of this management contract in behalf of the policy contracts originating in the Iowa company.

In view of the labored effort of respondents to justify this management contract, petitioner desires to comment briefly. No management contract which establishes a lien against the policy reserve of 75% with interest payable by the policyholder upon his own reserve at 4% and with high overhead management costs to liquidate the mismanaged assets of an insolvent debtor, as provided in the agreement, and no new business to create income, establishes anything

of value in the way of insurance for the policyholder upon which he is required to pay the premium the same as though the contract were not impaired. There are no benefits to the policyholder and it can be justified only as beneficial to the management. A point is made that 50% of the policy contracts originating in the Iowa Company are paid up. This fact emphasizes the impairment of a paid-up policy contract by the creation of a 75% lien with 4% interest plus management costs against the policy reserve. Any remaining equity is exceedingly small and the only way a policyholder can hope to beat the game is to benefit the beneficiary by dying quickly.

By comparison, if petitioner prevails, the impairment of the policy contracts originating in the Iowa Company would be reduced by being burdened approximately with a 25% lien against the net legal reserve for reinsurance, or, upon liquidation of the deposit assets, the Iowa Company policy contract holders would receive approximately 75% in cash of the amount they have created by the payment of their premiums to establish the cash reserves of their contracts.

Respondents also refer to the fact that 13 years after the making of the reinsurance agreement with the Iowa Company the Iowa policyholders were distributed in many different states and several foreign countries. Petitioner contends the place of residence of policyholders who originated in the Iowa Company as of July 30, 1921, or as of November 17, 1939, is not controlling of any issue in this case. The contracts were made, issued and delivered in Iowa and by reason thereof are subject to interpretation under the laws of Iowa and particularly the statutory laws which inhere in the contracts. The facts show nothing more than a migration of persons who hold policies to a different place of residence. The Iowa Company was organized in 1900. At this time it was doing business in 14 states. As of September 1, 1921, the business originally issued by the Iowa Company and in

force on that date included 17,412 policyholders and insurance in force $32,208,062.49; 6,636 policyholders representing $11,662,684.15 of insurance in force were residents of the State of Iowa (R. Exhibit "Q" 341). The policy contracts and the insurance in force as shown by Exhibit "Q" is the subject of the reinsurance agreement involved in this case. The policyholders originating in the Iowa Company bought and paid for the protection provided by the Iowa statutes included and covered by their contracts. The Michigan Company had all of the benefits of the free assets and the premium income over and above the amount deposited with the Insurance Commissioner of Iowa covering the net equity reserve of the Iowa contracts. Considering the additional number of policyholders and the increased amount of insurance in force and the income from all of the assets including the deposited securities in Iowa, the benefits were substantial. Had it not been for gross mismanagement by certain officers, these benefits would have continued and insolvency been avoided.

The benefits were derived from the income from assets amounting to $3,226,897.40 (Exhibit "B", R. 403-405), which included the income from the deposit of securities with the Commissioner of Insurance of the State of Iowa as of August 24, 1921, of $2,930,840.71 (R. 192), and the premium income from insurance in force as of September 1, 1921, amounting to $32,208,062.49.

Another weakness develops in respondents' position. In American United Brief, page 22, is the following:

> "The constant stressing by petitioner of the existence of a lien might be in point as to other general types of deposits, but there is no more than an 'inchoate lien' in the instant case, and the interest of the policyholders of the Michigan Company is not subject to determination."

It is satisfying to note the admission of an "inchoate lien". Petitioner insists that it is a complete lien created by the Iowa policyholder contract established by the requirements of the Iowa deposit statutes and, upon insolvency, required to be enforced by the Iowa statutes for the sole and exclusive benefit to the extent of the reserve of the policy contract. Such being the case, it is a contractual and statutory lien and even a better lien than a recorded document subject to foreclosure action, since the Commissioner of Insurance of Iowa is constituted statutory trustee with title for the purpose of protecting and enforcing the lien for the benefit of the individual policyholder contract.

It is important to remember in considering the facts that the Insurance Commissioner of Iowa as receiver, by order and decree of the District Court of Polk County, Iowa, pursuant to the Iowa statutes and law, is receiver only of the assets of the Iowa deposit which was made for the benefit of the policyholders originating in the Iowa Company, to the end that their lien as against any and all other claims to the deposited assets may be enforced and their contracts protected and performed. The respondents deny the holders of the contracts the protection after insolvency of the company, which the company performed and was obligated to perform before insolvency. The obligation created by the contract between the corporate entities, the policy contract and the assumption agreement should be strictly construed in favor of the policy contracts. The question of economical and orderly liquidation of assets of an insolvent insurance company is not involved. The Iowa deposit was a special deposit for the specific benefit of the contracts of insurance originating in the Iowa Company, and the Iowa Court should be permitted to enforce the liens of these contracts against the deposited assets without interference by respondents.

II.

THE CASE OF *SHLOSS* v. *METROPOLITAN SURETY CO.* DECLARES THE POLICY OF THE STATE OF IOWA AND DENIES THE APPLICATION OF THE RULE OF *RELF* v. *RUNDLE* UPON THE FACTS IN THIS CASE.

Respondents rely upon a decision of this court in the case of *Relf* v. *Rundle*, 103 U. S. 222, 26 L. Ed. 337, to sustain their position. The very argument which respondents now urge upon this court was impressed upon the Supreme Court of Iowa in the case of *Shloss* v. *Metropolitan Surety Co.*, 149 Iowa 382, 128 N. W. 384, in which the domiciliary receiver of an insolvent insurance company claimed possession of the assets of the company found in Iowa and argued that any Iowa claims had to be presented to the court of the insolvent corporation's domicile in New York. In holding against the contention of the domiciliary receiver the Supreme Court of Iowa says:

> "Counsel for appellant relies, however, upon the case of *Relfe* v. *Rundle*, 103 U. S. 222, 26 L. Ed. 337, in which it was held that the superintendent of insurance under the statutory provisions in the state of the company's incorporation became the representative of the life insurance companies on their dissolution by decree of the court in such state and vested with the entire right to their property for the benefit of their creditors and policyholders, and was entitled to represent such dissolved companies in litigation in another state, and as such representative might apply for removal of such litigation in a proper case to the federal courts. On this case, and other cases expressly following it, counsel seek to define some peculiar kind of receivership which shall not be subject to the rule of the courts of this state that a foreign receiver cannot claim the funds of the company as against local creditors. We do not discover that any of the cases relied upon support such a definition. The rights of the creditors in this state to attach the funds of a foreign insolvent corporation for the purpose of enforcing payment notwithstanding the receivership in the state of the corporation's home is not a matter

> of procedure, but one of substantive law, and we fail to see how any statute in New York could authorize such receivership as would exempt the receiver from the limitations imposed on his power by the rules of law recognized in this state. The case of *Relfe* v. *Rundle*, just cited, has no direct application in the case before us, for here the foreign receiver is allowed to represent the company without objection, and the sole question is whether he can take the company's assets out of the jurisdiction of this state without liability here for its local debts."
>
> *Shloss* v. *Metropolitan Surety Co., supra.*

So, likewise, in the case now before this court, the respondent Michigan receiver, as successor of the Michigan Company, is allowed to represent that Company without objection, but this is as far as his rights go under the Iowa law, and he will not be permitted to take the deposit out of the jurisdiction of the State of Iowa without the consent of petitioner and the Iowa court. If, as the Supreme Court of Iowa holds, "the rights of the creditors in this State (Iowa) to attach the funds of a foreign insolvent corporation for the purpose of enforcing payment notwithstanding the receivership in the State of the Corporation's home is not a matter of procedure, but one of substantive law," so much more must it be the law that the administration of assets deposited in the State of Iowa pursuant to an agreement to maintain the same reserve as was required of a former domestic company, will be upheld and permitted.

Respondents also rely upon such cases as *Fry* v. *Charter Oak Life Insurance Company*, 31 Fed. 197, and *Parsons* v. *Charter Oak Life Ins. Co.*, 31 Fed. 305, but these cases have also been considered by the Supreme Court of Iowa and held not to require the delivery of local assets to a foreign receiver as against local lien holders or creditors. The Iowa court says, again in the *Shloss* v. *Metropolitan Surety Company* case,

> "In the cases of *Fry* v. *Charter Oak L. Ins. Co.*, (C. C.) 31 Fed. 197, and *Parson* v. *Charter Oak Ins. Co.*, (C. C.) 31 Fed. 305, the doctrine of *Relfe* v. *Rundle* was applied to the distribution of assets of a mutual life insurance company among its members, whose rights it was held were determined by the charter of the company. Without acceding to the soundness of the reasoning employed in deciding that case, it is sufficient to say that the case before us is not analogous, for plaintiff's rights as against this defendant company were determined by contract, and contract alone, and those substantive rights are not to be affected, as we think, by statutory provisions of New York with reference to the method in which the company may be wound up."

It is to be noted that the Supreme Court of Iowa differentiates the *Charter Oak Cases* as belonging to the class of decisions applicable to members of a mutual life insurance company. All of the series of Life Association of America cases, following *Relf* v. *Rundle*, and which are cited and quoted from copiously in respondents' briefs, similarly involve situations where the policyholders of a mutual insurance company are held to be members thereof and therefore bound by its charter.

The Supreme Court of Iowa holds that the rule applicable to members of mutual companies is not an authority where the claimants are policyholders whose rights are "determined by contract, and contract alone". Respondents try to speak of the Iowa Company policyholders as "members" but by no exercise of the imagination can a policyholder in a stock company be held to be a member of the company so as to be bound by the provisions of its charter concerning liquidation. A policyholder of a stock company which has become insolvent is a creditor with a claim for breach of contract, and the damage to which he is entitled is the return of the reserve value and the premiums unearned. *Schloss* v. *Metropolitan Surety Co.*, *supra.*

Petitioner therefore earnestly urges that the Supreme Court of Iowa having declared the policy of the State of Iowa to be that the statutory successor of an insurance company is not entitled to remove local assets as against liens and claims arising under the Iowa law, and that policyholders' contracts of an insolvent stock insurance company are not bound by the company's charter provisions regarding insolvency, the Federal Court is required to apply the Iowa rule. *Erie* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188. Recognition by the Federal Court of the law announced by the Supreme Court of Iowa that a foreign domiciliary receiver is not entitled to remove assets from Iowa and administer them at the discretion of the domiciliary court, as against rights, liens and claims arising or existing under Iowa law, is a complete answer to respondents' position. *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, 85 L. Ed. 969.

Respondents recognizing the binding effect of the policy of Iowa as announced by its Supreme Court in the *Shloss* case and as recognized by this court in *Clark* v. *Williard*, seek to avoid the same by claiming that petitioner is not a creditor and that this case does not involve the enforcement of a lien or other right within said Iowa policy. This argument is answered and refuted by each and all of the facts in this case beginning with the negotiation for reinsurance of the Iowa Company by the Michigan Company in 1921 and extending up to the insolvency of the Michigan Company in 1938. The Iowa Company was organized and became an entity under the laws of Iowa and included in those laws was the requirement of the deposit with the Iowa Commissioner of Insurance of securities equal to the legal reserve on the policies issued by the Company. Iowa statutes likewise provided that the Insurance Commission of Iowa, consisting of three of its highest officials, were entrusted with the protection of the interest of a domestic company's policyholders where an attempt is made to rein-

sure the domestic company and that such company could be reinsured or consolidated with another company only upon such conditions as said Commission saw fit to impose. One of the conditions which the Iowa Commission required of the Michigan Company was the continued maintainance with the Iowa Commissioner of the deposit which had been required of the Iowa Company. The Michigan Company subjected itself when it acquired the Iowa Company's business and reinsured the same to such maintenance of said deposit under the statutes of Iowa. Under those same statutes and particularly 8661-8663 of the Code of Iowa which apply by their terms equally to foreign and domestic companies, any such deposits upon the insolvency of the company vest in the State of Iowa for the benefit of the policyholders for whom they were deposited and petitioner is made a statutory trustee for the purpose of liquidating said assets or obtaining reinsurance. Under these facts it cannot be seriously contended by respondents that petitioner is not enforcing a lien and making a claim to assets of the insurance company located within Iowa, within the meaning of the Iowa rule of law which gives such rights as against a foreign domiciliary receiver.

III.

THE CASE OF *STATE EX REL GIBSON* v. *AMERICAN BONDING & CASUALTY COMPANY* DECLARES THE POLICY OF THE STATE OF IOWA TO BE THAT SECURITIES DEPOSITED WITH THE COMMISSIONER OF INSURANCE OF IOWA CONSTITUTE A TRUST FUND AND THE COMMISSIONER A TRUSTEE OF THE DEPOSIT AND A TRUST FUND IN THE HANDS OF A RECEIVER.

The case of *State ex rel Gibson* v. *American Bonding & Casualty Company*, 206 Iowa 988, 221 N. W. 585, declares securities on deposit with the Commissioner of Insurance of the State of Iowa constitute a trust fund and the Com-

missioner of Insurance either as a public official or as a private individual a trustee of the deposit. Whether the deposit was required by statute with a valid recognition of an agreement to continue that status or was simply a voluntary deposit made by the Michigan Company for the protection of the policyholders of the Iowa Company, it would have had equal significance and effect under the Iowa law.

In the above case the Company incorporated in the State of Iowa, deposited the securities with the Insurance Commissioner of Iowa as guaranty for payment of insurance policies issued by it under the mistaken belief of Commissioner and Company that such a deposit was required when there was no statutory requirement for such a deposit. The Supreme Court of Iowa in the course of the opinion said:

> "The fund did not lose its trust character because it was deposited with the commissioner of insurance under an evidently mistaken belief on the part of the commissioner and also the company that such deposit was required. The stipulation of the parties is that the securities were deposited with the commissioner 'under his ruling requiring said company to deposit with said Commissioner of Insurance of the State of Iowa the said capital assets of said company before the original license to do business would be granted to said company,' and that said deposit was in compliance with his demand and his ruling and for the protection of the policyholders of said company, in accordance with his interpretation of the law. There is no allegation of fraud or duress. The fact that the deposit was made by reason of a misapprehension of the statute, and the belief on the part of the parties that it was essential, did not deprive the deposit of the trust character or change the terms under which it was deposited namely, 'for the protection of policy holders.'
>
> "The trial court held that the securities deposited with the commissioner of insurance constituted a trust fund which passed into the hands of the receiver, and that the appellee, as the holder of claims for unearned

premiums, was entitled to have its claim established as against said fund. While the securities deposited with the commissioner of insurance were not deposited in pursuance of any statute of this state requiring the deposit to be made, they were deposited in pursuance of a demand of the commissioner of insurance, and under the stipulation were so deposited 'for the protection of policy holders of said company.' Even though the deposit of said securities was not required by law, the deposit was made by the corporation as a segregation of certain of its assets for a particular purpose, to-wit, 'the protection of its policy holders.' This was not an illegal act on its part, and did not contravene the public policy of the state with regard to certain other insurance companies, and, in fact, was in keeping with it. The corporation had a legal right to set apart said securities in the hands of the insurance commissioner, or some other trustee, as a trust fund 'for the protection of its policy holders.' It matters not whether the commissioner of insurance thereafter held the same as a public official or as a private individual. No question is raised of his right to act as the custodian or trustee of such a fund, and we see no legal objection to the creation of such a trust fund in his hands for a particular lawful purpose." * * *

"If a trust existed and was created by the act of the company, it will not be defeated because of any inability or want of authority on the part of the trustee to act. It is elemental that a court of equity will not allow a trust to fail for want of a trustee. In any event, the fund was held by the commissioner of insurance as a trustee, and was surrendered by him to the receiver appointed by the court, and is now in the custody of the court. We treat the fund, therefore, in the hand of the receiver, as being a trust fund created by the corporation 'for the protection of the policy holders of said company.' "

Applying the above declared policy of the State of Iowa together with the obligations created in the policyholders' contracts originating in the Iowa Company, the covenants of the Michigan assumption agreement and the reinsurance agreements between the Michigan and Iowa Companies, it seems clear that whether the deposit was voluntary, contractual or

statutory the trust fund was constituted for the sole benefit of the policyholders' contracts which originated in the Iowa Company and the Commissioner as trustee or subsequent statutory receiver was required to administer the trust fund for their exclusive benefit.

IV.

THE AUTHORITIES CITED DO NOT SUSTAIN RESPONDENTS' ARGUMENT THAT THE MICHIGAN RECEIVER IS ENTITLED TO ADMINISTER ALL OF THE ASSETS OF THE INSOLVENT COMPANY.

Petitioner denies that the rules in the cases cited by respondents sustain the argument of respondents to the effect that the Michigan Receiver is entitled to administer all of the assets of the insolvent company. Petitioner herein has demonstrated the rule in *Relf* v. *Rundle* and associated cases is not applicable to the facts in the case at bar. The distinguishing factors in the principal cases relied upon by respondents is clearly demonstrated in the following analysis.

The decision in the case of *Illinois Life Insurance Company* v. *Tully*, 174 Fed. 355, (C. C. A. 8, 1909) is claimed to support respondents' contentions, but a reading of the case and an analysis of the fact situation, together with the law applied, demonstrates that the decision is not contrary to the petitioner's position in this case but by inference supports the same. In the *Illinois Life* case the Kansas Mutual Life Insurance Company had been organized under the laws of Kansas and had deposited with the State Treasurer of Kansas over $500,000 in securities. The suit was brought to wind up the affairs and liquidate the Kansas Mutual, and, at a judicial sale, the Illinois Life Insurance Company, of Illinois, purchased the assets and reissued the policies of the Kansas Company. The Kansas Treasurer refused to turn over the deposit to the Illinois

Life, and the Illinois Life then filed this ancillary bill in the Federal Court in Kansas to obtain possession of the securities. The Court granted the relief sought by the Illinois Life Company, for the following reasons:

> (1) There was no statutory authority under the laws of Kansas for the making of the original deposit by the Kansas Company or for the retention of the deposit after the purchase of the assets by the Illinois Life. Also, the only law under which the original deposit could possibly be considered as required on the part of the Kansas Mutual Life Company had been repealed before the Illinois Life Company bought the assets of the Kansas Company and entered into a reinsurance contract.
>
> (2) The reinsurance contract did not obligate the Illinois Company to maintain any deposits with the Kansas Treasurer but, on the other hand, expressly required transfer of all property of the Kansas Mutual to the Illinois Life. The Court pointed out that if the deposited assets were to have been retained by the State Treasurer, such an important part of the transaction would have been specifically provided for in the reinsurance contract, whereas, the contract was silent on this feature.
>
> (3) The Illinois Life Company was not estopped from claiming the right to possession of the deposit by reason of a letter which it sent to the Kansas Mutual policyholders concerning future plans of the Illinois Life with reference to their business, since it did not appear that the letter was sent to the policyholders before their claims against the Kansas Company had been surrendered and the obligation of the Illinois Company accepted in lieu thereof and, in any event, the letter contained mere expressions of intentions concerning a future policy.

In contrast to the facts in the *Illinois Life* case, it should be noted that in the case at bar:

> (1) The Iowa statutes did, in the first instance, require a deposit by the Iowa Company to protect its reserves;

(2) Under Chapter 409 of the Code of Iowa (R. 223), the Insurance Commission of Iowa had authority to and did require continued maintenance of the deposit with the Iowa Commissioner as a condition of the reinsurance of the Iowa Company's business by the Michigan Company;

(3) The reinsurance agreements entered into by the Michigan Company (R. 203, 208, 215) expressly required and the Michigan Company undertook that there would be continued with the Iowa Commissioner the same deposit as would have been required by the Iowa Company, and

(4) By its certificate of assumption (R. 227), the Michigan Company agreed to carry out all obligations of the Iowa Company, one of which obligations was the maintaining of said deposit in the State of Iowa.

Thus, it is apparent that the case at bar contains the very factual elements which were lacking in the *Illinois Life* case and which, if present in the latter case, would have resulted in a decision upholding the deposit in the State of Kansas.

In the case of *Blake* v. *Old Colony Life Ins. Co.*, 209 Fed. 309 (C. C. A. 8, 1913), the Cosmopolitan Life Insurance Association had been organized under the laws of Illinois and made application for permission to do business in Missouri. The Missouri Insurance Department required that a deposit be made by the Cosmopolitan, and this deposit was made before permission to do business was granted by Missouri. The Cosmopolitan of Illinois then reinsured the business of a fraternal company known as the Royal Tribe of Joseph, doing business in Missouri, and the reinsurance agreement was approved by the Missouri Department. Subsequently, the assets of the Cosmopolitan Life of Illinois were purchasd by the Old Colony Life of Illinois. The Old Colony Life of Illinois then brought suit against the Missouri Superintendent of Insurance to recover the deposit. The plaintiff was allowed to recover the deposited securities,

since the insurance laws of Missouri did not require a deposit by foreign insurance companies doing business on the stipulated premium plan, and the deposit had been demanded in the first instance because Illinois had no law requiring a deposit by its own insurance companies and the requirements of the Missouri Superintendent would not have been made if Illinois had had such a law. It was also pointed out that the Cosmopolitan Life of Illinois had not understood that the beneficiaries of the deposit would have been any different than if the money had been deposited in Illinois, the State of its origin. The case did not involve the question of the disposition of a deposit originally required by Missouri statute of a domestic company. The facts in the case at bar outlined above in connection with the case of *Illinois Life Insurance Company* v. *Tully, supra*, are equally applicable here in distinguishing the *Blake* decision from the case at bar.

V.

NEITHER THE CONTRACTS OF THE MICHIGAN COMPANY WITH THE IOWA COMPANY NOR THE CONTRACT OF THE RESPONDENT MICHIGAN RECEIVER WITH RESPONDENT AMERICAN UNITED COMPANY CREATED A NOVATION.

In Division IV of the brief of respondent Michigan Receiver the claim is made that the agreements between the Michigan and Iowa Companies and the agreement between the Michigan Receiver and the American United created a novation. Petitioner denies such rule is applicable under the facts in this case. The policies designated as originating in the Iowa Company did not surrender their rights to the assets in the possession of the Iowa Insurance Commissioner by accepting a certificate of assumption issued by the Michigan Company originally, nor by the "American United Life Insurance Company" authorized by the Michigan re-

ceivership. In every novation there are four essential requisites: (1) A previous valid obligation; (2) the agreement of all the parties to the new contract; (3) the extinguishment of the old contract; and (4) the validity of the new contract. Until these elements appear, there is no novation.

The trial court in its opinion states (R. 439):

> "* * * but I am unable to see any new contract as between the policyholders and the new company. Under the agreement the new company was to carry out and be bound by the agreements with the Iowa company with the same force and effect as though the company had remained in Iowa as a domestic corporation. During the period of time between 1923 and the receivership of the Michigan company the latter company carried out its agreement by depositing securities with the Iowa Commissioner of Insurance in an amount equal to the cash reserve value of the insurance policies of the Des Moines group and never questioned the contract assumed by it. And when we consider that the contract of reinsurance was approved by high officials of Iowa and the Commissioner of Insurance of the State of Michigan, it is hard to consider the contract as being against public policy."

It is equally difficult to see where there was an agreement to relinquish these securities in the Michigan Company. Every part of the contract, every act of the company, and the silence of the policyholders, all point positively to the fact that the policyholders believed and acquiesced, if at all, on the assumption that their policies were secured by the deposit in the hands of the Iowa Insurance Commissioner.

There never has been a waiver on the part of the policyholders of the lien upon these funds. They never have been asked by the Michigan Company to waive this lien, never have been expected to waive it, but, on the contrary, all fair construction of the acts of all parties reaches the end that

all of the parties intended a lien in their favor. When the business of the Iowa Company was taken over by the Michigan Company, a certificate of assumption (R. 227) was given to each of the policyholders, which, in part, provides:

> "THIS IS TO CERTIFY that the policy above mentioned, issued or assumed by AMERICAN LIFE INSURANCE COMPANY, Detroit, Michigan, has been assumed by the AMERICAN UNITED LIFE INSURANCE COMPANY, Indianapolis, Indiana, *subject to the terms and conditions of the policy and of a reinsurance agreement, copy of which is attached hereto and made a part hereof.*" (Italics supplied.)

And when the sale was made by the Michigan Receiver to the American United Company, Article 36 of the contract recognized the controversy herein and is conditional upon a determination of the questions by a court of competent jurisdiction (R. 338-342). The Commissioner of Insurance of Iowa as receiver is not a party to the contract nor was any attempt made to make or recognize him as a necessary party in interest.

Under these provisions of the contracts no claim should be made that the policyholders voluntarily released their right to this fund. The Supreme Court in the case of *Hyde & Gleises* v. *Boornem & Co.*, 41 U. S. 169, 10 Law Ed. 925, at page 929, in discussing a contract that we believe is on all fours with this case, says:

> "But no extinguishment is wrought if the arrangement is conditional, and the conditions are not fully complied with. Pothier (Pothier on Obligations, 550, 551) states this in the most clear and explicit terms. 'It follows,' says he, 'that if the debt of which it is proposed to make a novation by another engagement is conditional the novation cannot take effect until the condition is accomplished;' therefore, if there is a failure in the accomplishment of the condition, there can be no novation, because there is no original debt to which the new one can be substituted. Vice versa if the first debt does

not depend on any condition, but the second engagement, intended as a novation, is conditional, the novation can only take effect by the accomplishment of the condition of the new engagement, before the first debt is extinct."

The Court, in *City National Bank of Huron* v. *Fuller*, 52 Fed. (2d) 870, points out that in order to effect novation there must be either an expressed or implied agreement on the part of the creditor to substitute the new debtor in place of the original debtor, and also an expressed or implied agreement to release and discharge the original debtor, and the court after reviewing many authorities, states:

"The cases establish the following propositions:

"(a) The mere assumption of a debt by a third party is not sufficient to constitute novation. (Citing authorities.)

"(b) There is no novation, unless there is an intent to relinquish the original claim and the original debtor. (Citing authorities.)

"(c) All parties must agree to the substitution of the new debt and debtor. The creditor is under no obligation to accept a new debtor. (Citing authorities.)

"(d) The intent of the creditor to look to the new debtor is not in itself a release of the old debtor, unless clear from all the circumstances that it was so intended, and the creditor may have a remedy against both old and new debtor. (Citing authorities.)"

This case does not in any sense satisfy these requirements of novation. At no time can it be said that the creditor policyholders ever intended to release the Iowa Company or the security that they were given under their policies, and the laws of Iowa relating to domestic companies. From whatever angle we look at the situation of the parties, the only conclusion that can be reached is that the Michigan Company took over the business of the Iowa Company with all the liabilities of the Iowa Company to its policyholders secured

by the statutory lien they had thereon. These policyholders could not accept part of the Assumption Certificate and reject other parts but must be deemed to have accepted the certificate according to its terms. *Quhl* v. *General American Life Insurance Company*, (Ga.) 192 S. E. 831, 833. By the very terms of the certificates the Iowa Company policyholders understood that, the claims of the Iowa Receiver and the respondent, to the Iowa deposit would be litigated, and their rights protected by the Court. Under the contract of 1921 the Michigan Company expressly agreed to the lien that the Iowa Company policyholders had upon the assets. Under these circumstances there would be no novation between the parties.

Tannhauser v. *Shea*, 88 Mont. 562, 295 Pac. 268.

In *Hobbs* v. *Occidental Life Insurance Company*, 87 Fed. (2d) 380 (C. C. A. 10, 1937), an action had been brought in the Federal Court in Kansas wherein a permanent receiver was appointed for the Federal Reserve Life Insurance Company, a Kansas corporation. Under the direction of the Federal Court in Kansas, a reinsurance agreement was entered into with the Occidental Life Insurance Company. The reinsurance contract provided that title to all of the assets of the Federal Reserve, including those on deposit with the Insurance Commissioner of any state, should vest in the Occidental. Pursuant to the laws of Kansas, certain notes, mortgages, and bonds had been on deposit with the Insurance Commissioner of Kansas and had belonged to the Federal Reserve Life of Kansas. The Occidental filed a petition for an order requiring the Commissioner to deliver to the Occidental or to the receiver, certain notes and mortgages which were delinquent. The Court found that these delinquent securities should be foreclosed and that the Kansas Commissioner had no authority to maintain such foreclosure suits. The Court entered an order providing for delivery of the

desired securities to the Occidental for foreclosure purposes, *and the order further provided that the proceeds from said securities should be deposited with the Commissioner.* The Circuit Court of Appeals affirmed the action of the lower court.

In this connection it should be noted:

(1) That the order directing the turning over of the securities came from the Kansas Federal Court which had been administering the receivership and that the securities were in the jurisdiction of said court;

(2) That the reinsurance agreement had been approved by the court in whose jurisdiction the securities were located and provided for transfer of all such deposits to the reinsuring company.

(3) That the securities on deposit with the Kansas Commissioner had admittedly been made by a domestic corporation for the benefit of all policyholders and that the reinsuring company had agreed to assume all such policies—in other words, *there was no question involved of a deposit for the benefit of a particular group of policy holders,* and

(4) The order of the court provided that the proceeds from said securities should be deposited with the Kansas Commissioner.

State of Kansas ex rel. v. *Occidental Life Insurance Co.,* 95 Fed. (2d) 935 (C. C. A. 10, 1938), involved proceedings taken subsequent to the decision in *Hobbs* v. *Occidental Life Ins. Co., supra.* After the decision in the latter case, the Occidental petitioned the Federal Court in Kansas to require delivery of the securities of the Federal Reserve then remaining on deposit with the Commissioner of Insurance of Kansas and actually in the custody of the State Treasurer. The Court ordered the surrender of said securities on condition that the securities be administered in accordance with the contract of reinsurance and, by a subsequent order provided that as long as the lien created in the contract of reinsurance remained in

effect, all personal property formerly belonging to the Federal Reserve should be kept within the jurisdiction of the Federal Court for Kansas. The Circuit Court of Appeals affirmed the action of the trial court and stated:

> "The retention of the property within the jurisdiction of the court, and the administration of it separate and apart from other property, subject to the supervision and control of the Court, provides reasonable and adequate protection for all parties."

Again, it should be pointed out that the funds deposited with the Kansas Commissioner by the Federal Reserve of Kansas were admittedly for the benefit of all policyholders wherever located, and there was no question involving the rights to the deposit of a particular class or group.

From the foregoing it will be concluded that respondents' contention that the contracts of reinsurance between the Iowa Company and the Michigan Company, and between the respondent receiver of the Michigan Company and respondent American United Life Insurance Company created a novation, is without foundation.

VI.

PETITIONER'S REPLY TO BRIEF OF RESPONDENT TEXAS RECEIVER.

Petitioner desires to comment briefly in reply to the brief of respondent Texas Receiver. This respondent's argument seems directed primarily as a complaint against the provisions of the decree of the trial court which granted affirmative relief to petitioner. The Circuit Court of Appeals did not review the terms of the decree and the only question decided was that the Federal Court did not have jurisdiction of the subject matter of this suit. The questions presented by petitioner are upon this issue and respondent Texas Receiver's brief is not responsive to these questions. The pic-

ture of chaos and confusion of administration so elaborately painted is purely imaginary. The Texas Receiver is but an incidental party and admittedly the Texas receivership is ancillary to the Michigan receivership.

Division I of Texas Receiver's brief is predicated on the prior commencement of the Texas suit looking to ancillary receivership. The answer of this proposition is that, upon insolvency of the Michigan Company, by applicable statute, title to the deposited securities vested in the State of Iowa as of April 12, 1938 prior to the Texas suit. A further answer is that, under the law of Iowa, the deposit fund is constituted a trust fund and the Insurance Commissioner of Iowa a trustee and the situs of the deposit assets was in Iowa and not in Texas. The position of the Commissioner of Insurance as trustee, was changed to statutory trustee with title for the purpose of administration upon his appointment as Receiver by the Iowa Court. As Commissioner or Receiver he is charged with the same responsibility of administering the deposit fund for the benefit of the persons and contracts for whom the deposit was made. The change in designation in the capacity of the officer entrusted with the fund, especially by placing the fund in Court, cannot change the trust character of the fund or the rights of the beneficiaries in the trust property.

Respondent contends that the Texas Receiver had the right to make collections from Texas debtors whose promissory notes secured by recorded mortgages were admittedly in the possession of the Iowa Receiver. Petitioner asserts that the promissory notes and vendor lien notes secured by recorded mortgages and deeds of trust given by residents and corporations of the State of Texas were physically in the possession of the petitioner in the State of Iowa and were property within Section 57 of the Judicial Code, having a situs in the State of Iowa, which conferred jurisdiction upon the trial court to hear and decide this case.

For jurisdiction to sustain constructive service in actions *in rem* against nonresident claimants and to determine the situs of intangibles where the instruments are considered property separate and apart from the obligations which they represent, the following intangibles,—government bonds, negotiable instruments and cash on deposit in banks, are regarded at the place where the document, paper, bond, promissory note, cash on deposit or the *res*, as each may be designated, is located and the situs of the *res* within the state and district would give the court jurisdiction *in rem* and permit the court to enter a decree concerning the rights or interest of nonresidents, provided the decree did not compel action upon the part of nonresident defendants. All of the above described intangibles are represented in the deposit for the benefit of the policies of insurance originating in the Iowa Company in the possession of the Iowa Receiver in Des Moines, Polk County, Iowa.

The position that the securities and property involved in this action have a situs in the southern district of Iowa is sustained by the American Law Institute's Restatement of Conflict of Laws, Section 51, dealing with "jurisdiction of intangible things", which states:

> "No state has jurisdiction of intangible things, except as stated in Sections 50, 52 and 53."

Section 53 is the applicable section and is as follows:

> "Where a right is by the law which created it embodied in a document, the right is subject to the jurisdiction of the state which has jurisdiction over the document."

This rule is recognized by the Supreme Court of Texas in the case of *Guaranty Life Insurance Company* v. *City of Austin*, 190 S. W. 189, where the Court says:

"It is to our minds illogical that promissory notes are incapable of acquiring a distinct situs. They are personal property under our laws. Because of their concrete form they are made use of as property in the every day transactions of the people. Their presence is generally availed of as an element of such use. Because of this they constitute something more than mere evidence of debts. When they are thus made to perform the functions of tangible personal property, they have all the character of that class of property, and are as fully capable of acquiring a situs apart from their owner's domicile as any property of that class."

Other cases which rule that bonds, bank credits and promissory notes have their situs in the state where such items are physically located are: *Gilmore* v. *Robillard*, 44 Fed. (2d) 295; *Omaha National Bank* v. *Federal Reserve Bank of Kansas City*, 26 Fed. (2d) 884, Cert. denied 278 U. S. 615, 73 Law Ed. 539; *Franz* v. *Buder*, 11 Fed. (2d) 854, Cert. denied 273 U. S. 756, 71 Law Ed. 876; *Montfort* v. *Korte*, 100 Fed. (2d) 615; *Guaranty Trust Co. of N. Y.* v. *Fentress*, 61 Fed. (2d) 329; *Chase* v. *Wetzlar*, 225 U. S. 79, 56 Law Ed. 990; *Scottish Union & National Ins. Co.* v. *Bowland*, 196 U. S. 611, 49 Law Ed. 619.

To add to the chaos and confusion of the Texas Receiver, in a suit brought by him in the Texas State Court and removed to the United States District Court for the Northern District of Texas, which presented the question of the legal situs of the promissory notes upon which the Texas Receiver had made collections, where the original securities are in the possession of the Iowa Receiver, in the State of Iowa, the Honorable James A. Wilson, Judge of the Texas Federal Court, decreed the legal situs of said securities to be in Iowa as follows (Exhibit "S", R. 357):

"* * * and the Court, having heard the evidence and the argument of counsel for all parties, being of the opinion and finding that said securities are in the possession of the said Fischer in the State of Iowa, and

have their situs in the State of Iowa, and are not locat
in the State of Texas, and that the Court has no jur
diction as to said securities and as to the person of t
defendant Charles R. Fischer. * * *"

The deposit assets being physically in the possession
petitioner and having a situs in the State of Iowa, and ti
to said property having vested in the State of Iowa on i
solvency of the American Life Insurance Company, there w
nothing in Texas for the Texas State Court to take juri
diction of or for its ancillary receiver to take possession
so far as said obligations were concerned.

Division II of respondent's brief is a complaint again
the divesting of title of the Texas Receiver to land in Texa
Petitioner Iowa Receiver does not claim title to any land
Texas. Petitioner does assert title to certain vendor li
notes secured by deeds of trust on land claimed to be in t
possession of Texas Receiver.

Division III of respondent's argument claims that t
notes due from Texas residents secured by Texas lands ca
be enforced only by the ancillary receiver in Texas in th
courts of that State. The answer is that the receiver
possession will be required to foreclose such liens as ma
require court action, in accordance with the proper rules
procedure in Texas.

The IVth and last division of respondent's brief relat
to the trial court having no jurisdiction to render an *in pe*
sonam judgment in the absence of personal service. This
an erroneous position in the light of the facts since the r
spondent gave the court below jurisdiction to include in i
decree any relief incidental to the proper determination of
controversy under Section 57 of the Judicial Code. B
answering and praying for general equitable relief, respon
ent submitted to the jurisdiction of the court and an analys
of the answer so demonstrates. The answer included th

following: (1) Attempted to retain the objections made to the jurisdiction of the Court; (2) set up that petitioner, as receiver, was but an ancillary receiver to the receivership pending in Michigan; (3) that respondent Lydick was receiver appointed by authority of the District Court of Tarrant County, Texas; (4) that the securities involved were not deposited with the Iowa Commissioner of Insurance by virtue of the Iowa deposit laws; (5) that respondent admitted he claimed title and the right to possession of the securities and is collecting and retaining the income therefrom and has refused to remit to plaintiff the income obtained from such securities; (6) that the securities were not in the possession of the petitioner and that the situs of said securities was not in Polk County, Iowa, and (7) further prays for such other and further relief, both general and special, either at law or in equity, to which he is justly entitled. Upon this pleading and participation in the trial court, respondent submitted to the jurisdiction of the Court.

American Gasoline Corp. v. *Commerce Trust Co.*, 20 Fed (2d) 46.

American Mills Co. v. *American Surety Co.*, 260 U. S. 360, 67 Law Ed. 306.

Merchants Heat & Light Co. v. *Clow*, 204 U. S. 286, 51 Law Ed. 488.

The fundamental theory of respondent's appearance specially by answer and participation in the trial is well stated in the following:

> "A defendant interested in a controversy cannot be allowed to come in under special appearance and avail himself of all the chances of a decree in his favor and retire without harm if the decision of the court should be against him."
>
> Cyc. Fed. Proc., Sec. 762, citing *National Furnace Co.* v. *Moline Malleable Iron Works*, 18 Fed. 863.

While petitioner does not consider the foregoing question now involved in this case, the above cases decide the question.

CONCLUSION.

For all of the reasons urged in the Brief and Reply Brief, Petitioner respectfully submits that this Court should reverse the decision and decree of the Circuit Court of Appeals.

Respectfully submitted,

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